

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

MARIAN S. WILKEY-MARZIN,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

CSA 8 085 310

DOCKET NUMBER
AT-844E-98-0072-I-1

DATE: MAY 17 1999

Roscoe E. Long, Esquire, Dunedin, Florida, for the appellant.

Neale Ainsfield, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The appellant petitions for review of a May 1, 1998 initial decision that affirmed the Office of Personnel Management's (OPM) denial of her disability retirement application. For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115 and MODIFY the initial decision, still AFFIRMING OPM's decision. 5 C.F.R. § 1201.117.

BACKGROUND

The appellant, a PS-5 Letter Carrier with the Postal Service, applied to OPM for disability retirement benefits under the Federal Employees' Retirement System (FERS). Initial Appeal File (IAF), Tab 4, Subtab D at 1. In her application, she stated that she suffered from "Acute Stress Disorder." *Id.* Documentation that she submitted in support of her application indicated that she had also been diagnosed as suffering from post-traumatic stress disorder (PTSD), anxiety, and depression. *Id.* at 5-9. OPM issued an initial decision and a reconsideration decision, both denying her claim. IAF, Tab 4, Subtab A, Subtab C at 1-5. The appellant timely appealed to the Board. IAF, Tab 1. After OPM denied the appellant's disability retirement application, the Postal Service removed her, effective March 13, 1998. IAF, Tab 8 at 41. The Postal Service, in identifying its reasons for the removal action, stated that "[b]ased on medical

documentation provided by [the appellant's] physician, [the appellant] will not be released to perform any duties with the Postal Service in the near future. [The appellant has] been in a leave without pay status since June 4, 1996, well over one year."¹ *Id.*

A hearing was requested and held. Specifically, the administrative judge found that the appellant's evidence failed to provide a clearly reasoned explanation of how her condition prevented her from performing the specific duties of her position, or to clearly show the severity of her condition. Initial Decision (ID), IAF, Tab 11 at 3-4. He further found that the appellant failed to carry her ultimate burden of persuasion on the issue of whether her condition was merely situational and primarily incidental to the conditions of her former position in the Postal Service. *Id.* at 4. Finally, he found that the appellant had voluntarily refused to accept prescribed medication intended to alleviate the symptoms of her mental condition. *Id.* Upon these findings, the administrative judge affirmed OPM's reconsideration decision. The appellant timely petitioned for review. Petition for Review File (PFRF), Tab 1. The agency opposes the petition. PFRF, Tab 3.

ANALYSIS

In an appeal from OPM's denial of a voluntary disability retirement application, an employee bears the burden of persuasion by a preponderance of the evidence. *See* 5 C.F.R. § 1201.56(a)(2); *Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 417 (1981). To qualify for disability retirement benefits under FERS, an employee must meet the following requirements: (1) the individual must have completed 18 months of creditable civilian service; (2) the individual must, while employed in a position subject to FERS, have become disabled because of a medical condition, resulting in a deficiency in performance, conduct, or attendance, or if there is no such deficiency, the disabling medical condition must be incompatible with either useful and efficient service or retention in the position;² (3) the

¹ The appellant did not appeal her removal to the Board because she lacks standing to do so, i.e., she is not a preference eligible, a management or supervisory employee, or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity. *See* 5 U.S.C. § 7511(a)(1)(B); 39 U.S.C. § 1005(a); *see also Toomey v. U.S. Postal Service*, 71 M.S.P.R. 10, 12 (1996).

² Apart from her absences, the only indication in the record of any type of deficiency in the appellant's performance or conduct related to her alleged failure to complete certain forms promptly, as well as alleged problems concerning forwarding mail and the delivery of Express Mail. IAF, Tab 4, Subtab D at 3, 27-28. We note that it appears that, as a result of the appellant's absence from work, other employees had to perform her duties. In the supervisor's statement that was made in connection with the appellant's disability retirement application, her supervisor stated that her position had to be covered "daily through other resources." IAF, Tab 4, Subtab D at 2. The supervisor also indicated that the appellant had been absent from work from January 13, 1996 until November 8, 1996, when the supervisor completed his statement regarding the appellant's disability retirement application. *Id.* It is unclear, and we need not resolve the question for the purposes of the

disabling medical condition must be expected to continue for at least one year from the date the application for disability retirement is filed; (4) accommodation of the disabling medical condition in the position held must be unreasonable; and (5) the individual must not have declined a reasonable offer of reassignment to a vacant position.³ See 5 U.S.C. § 8451; 5 C.F.R. § 844.103(a).

The administrative judge, having determined that the appellant had not raised a claim of PTSD to OPM, found that there was no basis to consider her PTSD claim on appeal to the Board. IAF, Tab 11 at 2-3. However, the record clearly reflects that OPM considered the PTSD claim in reaching its determination to deny the appellant's disability retirement application. IAF, Tab 4, Subtab A at 1, Subtab C at 3. The administrative judge therefore erred by failing to consider the claim; thus, we will consider the claim below.

We first note that the Board recently reiterated that job-related stress resulting in physical and mental ailments that prevent an employee from performing the duties required in his position can warrant the granting of disability retirement. See *Marchewski v. Office of Personnel Management*, 80 M.S.P.R. 343, ¶ 7 (1998) (“the record shows that it was not stress or anxiety alone that rendered the appellant incapacitated for purposes of work, but rather, that the work-related stress and anxiety that he suffered caused his mental condition which was, itself, incapacitating.”); *Pugh v. Office of Personnel Management*, 38 M.S.P.R. 184, 188-89 (1988); see also *Farrero v. Office of Personnel Management*, 35 M.S.P.R. 630, 635 (1987) (psychiatric and psychophysiological symptoms resulting from job stress experienced in federal service can warrant grant of disability annuity).

Assuming, as the administrative judge did, that based upon the evidence of record, the appellant was removed from her position for inability to perform her duties, her removal constitutes prima facie evidence that she is entitled to disability retirement benefits. See *Bruner v. Office of Personnel Management*, 996 F.2d 290, 294 (Fed. Cir. 1993) (employee's removal for physical inability to perform the essential functions of her position constitutes prima facie evidence that she is entitled to disability retirement benefits). Based upon this *Bruner* presumption, the burden then shifts to OPM to produce enough evidence from which a reasonable fact finder could conclude that the appellant did not qualify for disability retirement. See *Trevaan v. Office of Personnel Management*, 69 F.3d 520, 526 (Fed. Cir. 1995); *Klein v. Office of Personnel Management*, 71 M.S.P.R. 366, 370 (1996). If OPM meets its burden of production, the Board then considers the totality of the evidence in deciding the disability issue. The appellant retains the burden of persuasion at all times to establish her entitlement to

present appeal, whether the agency's 1998 removal action was in fact based upon the appellant's absence from work rather than her actual physical inability to perform her duties.

³ It is undisputed that the appellant has completed more than 18 months of civilian service creditable under FERS. IAF, Tab 4, Subtab E. It is also undisputed that the agency made no offer of reassignment to another position and that the agency was unable to provide the appellant with a reasonable accommodation. IAF, Tab 4, Subtab D at 10.

disability retirement. *See Trevan*, 69 F.3d at 527; *Klein*, 71 M.S.P.R. at 370. For the reasons set forth below, OPM has met its burden and the totality of the evidence does not establish the appellant's entitlement to disability retirement benefits.

OPM can meet its burden of production to rebut a presumption of disability by demonstrating a lack of objective medical evidence providing a reasoned explanation of how certain aspects of a particular condition render the employee unable to perform specific work requirements. *See Trevan*, 69 F.3d at 526-27. Here, as detailed below, the appellant submitted documentation by Gerard E. Boutin, the clinical psychologist who began treating her on or about January 26, 1996, shortly after she began being absent from work, that indicates that the appellant suffers from PTSD and cannot work as a result of the condition because "she experienced severe stress and harassment at the post office." IAF, Tab 4, Subtab B at 52. However, there is no indication whatsoever in Dr. Boutin's submissions, or the submissions of Dr. Luis Byrne, a psychiatrist who treated the appellant in 1987-88, 1990, and briefly in 1996, regarding how her PTSD would affect her ability to perform the specific duties of her position. IAF, Tab 4, Subtab B at 7-11, 42-54; Tab 8 at 39-40.⁴

The heart of the appellant's claim is that her mental disorders are so severe that she cannot bring herself to attempt to perform her duties, i.e., that her disorders preclude her from even attempting the attendance required of her. As noted above, the *Bruner* presumption establishes a rebuttable presumption that the appellant's condition resulted in a performance, conduct, or attendance deficiency, or absent a demonstrated deficiency, that her condition is incompatible with either useful and efficient service or retention in her position. We find, however, despite her evidence, both subjective and objective, that the appellant ultimately fails to carry her burden of persuasion.

In essence, the appellant's view is that the mere existence of diagnosed Major Depressive Disorder and PTSD is dispositive evidence of the appellant's inability to perform any of the duties of her position. We do not agree. Moreover, we have considered other evidence

⁴ The materials prepared by M. Bradley, M.D., upon his review of the appellant's medical evidence for OPM, seriously questioned whether the appellant's condition met accepted diagnostic criteria for PTSD. Additionally, Dr. Bradley stated that her then-currently improved condition indicated that her conditions were not static. He further noted that the only course of treatment then being administered, counseling twice a month, was not an "intensive" treatment regime. Dr. Boutin declined, on confidentiality grounds, to supply the appellant's progress notes for OPM's review. IAF, Tab 4, Subtab C at 13 (Boutin letter dated 3/5/97). Dr. Bradley noted that he could not completely assess the records without them. Based on his review of her records, which did not include progress notes kept by Dr. Boutin, he recommended that the appellant's disability application be denied. *Id.* at 7A-10. We note that the patient's privilege of confidentiality belongs to the appellant, not Dr. Boutin, and so assume that the progress notes were withheld at her request or with her consent. Those progress notes were not offered at the hearing. In the absence of a complete medical documentation of the appellant's condition and the course of her progress, the persuasiveness of the other evidence offered is necessarily diminished.

presented by the appellant, including her testimony that she cannot return to the Postal Service because she becomes anxious if she is even near a Postal vehicle or a mail carrier and that such anxiety makes her want to become sick and run away. Hearing Tape (HT), Side A. Her uncorroborated subjective evidence does not provide a reasoned explanation of the origins of her PTSD or how it is disabling with respect to her specific duties. As such, there is no basis upon which to find that the appellant's depression or PTSD entitles her to disability retirement benefits.

There is no dispute that the appellant has not been at work with the Postal Service since January 13, 1997. Absence from work merits consideration in judging disability. However, unless there is corroborating evidence establishing impaired performance of one's duties, absence alone will not establish disability. See *Coleman v. Office of Personnel Management*, 43 M.S.P.R. 570, 574 (1990), *overruled on other grounds by Alford v. Office of Personnel Management*, 79 M.S.P.R. 114 (1998). We agree with the administrative judge that the evidence in the record before us does not demonstrate her inability to perform the specific duties of her former position. In the absence of a reasoned explanation of how her medical condition precluded the performance of those specific duties, we conclude that the crux of her claim, that the root cause of her inability to perform her duties is her absence from her position, cannot alone support a finding of disability. See *Dunn v. Office of Personnel Management*, 60 M.S.P.R. 426, 432 (1994) (absent clear and reasoned explanation of how medical condition affects employee's specific work requirements, physician's conclusion of disability unpersuasive), *appeal dismissed*, 91 F.3d 169 (Fed. Cir. 1996) (Table).

We further agree with the administrative judge that the appellant failed to carry her burden of persuasion with evidence sufficient to demonstrate either the severity or permanency of her medical condition. We note that the appellant has had similar bouts of mental anxiety, depression, and suggested PTSD off and on for many years, but has returned to her duties each time. IAF, Tab 8 at 28 (1987 occupational disease/compensation claim for "stress"); *id.* at 39-40 (1987 psychiatrist's diagnosis of anxiety disorder, adjustment disorder with anxious mood, and PTSD). It is simply unclear from the appellant's evidence how her present condition is so deteriorated from that diagnosed 11 years ago that she can no longer perform her duties. Her psychologist's materials make no reasoned comparative judgment of her present condition with the evidence of her prior medical records. These records indicate a significant prior history of eventual, successful returns to duty, despite the existence of what we are forced to assume are the identical mental conditions the appellant now suffers. Neither do the letters from Drs. Boutin and Byrne discuss the appellant's specific performance elements. In substance, Dr. Boutin merely repeats, and relies wholly upon, the appellant's subjective statements that she cannot perform her duties. While the appellant's subjective evidence of her claimed disability must be seriously considered, see *Chavez*, 6 M.S.P.R. at 422, we have previously found similar medical reliance upon *only* the appellant's subjective judgments unpersuasive where the medical evaluator did not also rely on objective reports of the appellant's performance. See *Faragon v. Office of Personnel Management*, 51 M.S.P.R. 63, 70 (1991). We find the medical evidence here similarly unpersuasive.

Moreover, we note that, unlike the appellants in *Marchewski* and *Farrero*, the appellant's condition is not so severe as to preclude her from any other employment. In *Marchewski*, we considered evidence that the appellant could not, because of his mental disorder, perform other work after his removal from federal service. While that evidence obviously had no bearing on the ultimate issue of whether the appellant was unable to perform the duties of his former position, it clearly was probative on, and tended to rebut, OPM's claim that the appellant's medical condition was merely situational. See *Marchewski*, 80 M.S.P.R. ¶ 7; *cf. Farrero*, 35 M.S.P.R. at 635 (psychiatrist's testimony that appellant was totally disabled from any employment considered persuasive on permanency of mental disability).

The appellant here has been continuously employed full-time outside of federal service since June 30, 1997, first as a secretary with Norrell Services, Inc., and later as a reservation agent with Continental Airlines since August 4, 1997. IAF, Tab 9 at 12. While the fact of later employment cannot be used to directly rebut the presumption of disability entitlement, it is relevant to the question of whether the appellant's condition is merely situational, as the administrative judge found. Such evidence directly bears on the appellant's ultimate burden to persuade the Board by preponderant evidence that she meets all the elements required to establish her disability. *Cf. Marchewski*, 80 M.S.P.R. ¶ 7. Because we find the medical evidence of the severity of her condition as it relates specifically to her duties is deficient, and that there is in fact evidence from her continued employment in a full-time job outside federal service tending to show that her stress-related condition is primarily situational, we cannot say on this record that the administrative judge erred in reaching a similar conclusion. See *Klein*, 71 M.S.P.R. at 372 (administrative judge did not err in affirming reconsideration decision where appellant did not thoroughly make clear the severity of medical condition).

Further, it is well settled that a disability annuitant claimant must establish the extent to which her disability can or cannot be controlled. *See, e.g., Burckley v. Office of Personnel Management*, 80 M.S.P.R. 617, ¶ 6 (1999); *Dunn*, 60 M.S.P.R. at 432-33. The appellant has presented no evidence on this issue. Mere assertions by her psychologist that treatment is required (principally periodic counseling and behavior therapy sessions, which apparently continue) and that her condition has improved do not suffice to show any degree of control of the condition, or the lack thereof. It is undisputed that the appellant's psychiatrist prescribed the antidepressant Xanax,⁵ but that the appellant refused to continue the medication beyond the initial three days' prescription. HT, Side A; IAF, Tab 11 (ID) at 4. An employee may refuse treatment if the treatment is unreasonable. *See Diener v. Office of Personnel Management*, 7 M.S.P.R. 551, 555 (1981). However, there is no evidence in the record that this recommended but refused treatment was unreasonable.⁶ Her refusal under the circumstances simply reinforces her failure to show to what extent, if any, her mental disorders could or could not be controlled. The appellant's unsupported fears that the medication might become addictive do not warrant excusing her from her duty to seek and receive reasonable medical treatment. The voluntary refusal to accept facially reasonable treatment has, standing alone, repeatedly and consistently been held by the Board to bar entitlement to a disability annuity. *See, e.g., Faragon*, 51 M.S.P.R. at 70; *cf. Diener*, 7 M.S.P.R. at 555 (where OPM's alleged benefits of refused surgical treatment are purely speculative, refusal will not bar disability entitlement).

The appellant asserts on review that the administrative judge erred by failing to give any consideration to the testimony of one of her co-workers and to the statements of several co-workers. PFRF, Tab 1 at 4, 6. The administrative judge's failure to mention all of the evidence of record does not mean that he did not consider it in reaching his decision. *See Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986). Furthermore, we have reviewed this evidence and find that it does not provide a basis upon which to find that the appellant is entitled to disability retirement benefits.

Based upon the appellant's lack of persuasive medical and other evidence to establish that her PTSD or Major Depressive Disorder are disabling, we find that the totality of the evidence does not establish that the appellant is entitled to disability retirement benefits. Accordingly, the administrative judge correctly affirmed OPM's final decision. *See Trevan*, 69 F.3d at 527.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

⁵ The administrative judge incorrectly identified the name of the prescribed drug as Zantac, an acid inhibitor used in treating stomach ulcers. IAF, Tab 11 (ID) at 4. The correct name, Xanax, is shown on the appellant's medical records at IAF, Tab 4, Subtab B at 12.

⁶ Dr. Boutin, the appellant's treating psychologist, in response to OPM's assertion concerning the appellant's discontinuance of the medication, merely stated that the appellant was free to accept or not accept a prescribed course of treatment. IAF, Tab 4, Subtab B at 9. Although this may be true, it is clearly unresponsive to the statutory and regulatory requirements that must be met by an applicant claiming entitlement to a disability annuity.

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.